

BOARD OF APPEALS
for
MONTGOMERY COUNTY

Stella B. Werner Council Office Building
100 Maryland Avenue
Rockville, Maryland 20850
(240) 777-6600

Case No. S-2477

**PETITION OF AMERICAN TOWER CORPORATION
AND AT&T WIRELESS SERVICES**

OPINION OF THE BOARD

(Effective Date of Opinion: October 4, 2002)

Case No. S-2477 is an application, filed on April 23, 2001, for a special exception pursuant to Section 59-G-2.43 (Public Utility Buildings, Public Utility Structures and Telecommunications Facilities) of the Zoning Ordinance to permit a telecommunications facility which includes a 150 foot monopole with twelve panel antennas and a 12 x 28 foot equipment shelter.

The subject property is Part of Parcel 666, located at the intersection of Hawkins Creamery and Laytonsville Roads, Gaithersburg, Maryland, in the RDT Zone.

By Resolution dated May 18, 2001, pursuant to Section 59-A-4.125 of the Montgomery County Zoning Ordinance, the Board of Appeals referred the case to the Hearing Examiner to conduct a public hearing and prepare a written report and recommendation. The Hearing Examiner convened a public hearing on March 15, 2002, which was continued on April 8, 2002 and April 23, 2002. The record was closed May 3, 2002 and the Hearing Examiner issued a Report and Recommendation for approval of the special exception dated May 3, 2002.

On June 10, 2002, the Board of Appeals received requests for Oral Argument on the Hearing Examiner's report from Jane B. Waldron, John R. D. Copley, Bette J. Marshall, Jane King, and Bruce Deppa. The Board held Oral Argument on Wednesday, September 4, 2002. Argument was limited to two issues:

- 1) Whether opposition parties in the cases were given appropriate access to the Applicants' radio frequency propagation maps; and
- 2) Whether the proposed location for the monopole would create an unsafe condition for airplane traffic at Davis Airpark.

Mark Nelligan, Robert T. Warner and Noel Marshall presented argument on behalf of opponents of the application. Edward Donohue presented argument on behalf of the Applicants. Martin Klauber, Esquire, Peoples' Counsel, also appeared.

Decision of the Board: Special Exception **granted**, subject to conditions enumerated below.

EVIDENCE PRESENTED

REPORT AND RECOMMENDATION

1. The Board has before it the Report and Recommendation from the Hearing Examiner, dated May 31, 2002. The Hearing Examiner recommends approval of the special exception, with conditions. [Exhibit No. 147(b)].

ORAL ARGUMENT

2. Mark Nelligan argued that opposition parties requested copies of the Applicants' radio frequency (RF) propagation maps, in order to have them independently evaluated by an RF engineer. He stated that opponents felt that this was important to developing a response to the Applicants' assertion that there is a need for the requested monopole, but that Mr. Donohue, on behalf of the Applicants stated that because the maps are proprietary, they could only be viewed at the public meetings involving the application. [Transcript, September 4, 2002, p.8].

3. In response to Board questions, Mr. Nelligan stated that he viewed the RF maps at the meetings held by the Telecommunications Transmission Facility Coordination Committee (Tower Committee), the Planning Board and the Hearing Examiner. He stated that opponents did not have an independent RF engineer at the meetings. Mr. Nelligan stated that he was not confident that the analysis of the RF maps performed by the Tower Committee's RF engineers is independent [T, p. 9, 10].

4. Robert Warner, a confronting property owner and licensed pilot, argued that placement of the monopole in the proposed location will create unsafe conditions both for airplane traffic at Davis Airport, and for citizens on the ground. Mr. Warner stated that the Federal Aviation Administration (FAA) Recommended Traffic Patterns for Aeronautical Operations around small airports say that airplanes will approach airports from 1.5 miles from either end of the runway. [T, p. 14]. In addition he stated that small planes operated below 1,000 feet in vertical relationship to the runway, and that helicopters and ultra lights operate

below 500 feet. Based on this information, Mr. Warner stated that the proposed monopole, to be located within 1300 feet of the runway, at a height comparable to a 13-story building, will be in an unsafe location. [T., pp. 150-17].

5. Mr. Warner objected to the fact that the Hearing Examiner's Report did not mention information contained in Exhibit No. 90, which was submitted by opponents, from the National Transportation Safety Board (NTSB) regarding the number and location of general aviation accidents.

6. With respect to whether the proposed location for the monopole would create an unsafe condition for airplane traffic at Davis Airpark, Mr. Donohue cited the July 3, 2001 letter from Jaime A. Giandomenico, Aviation Systems Planning Officer, Maryland Aviation Administration, which states in part:

"By reducing the height of the proposed tower from 150 feet to 134 feet mean sea level, and no longer infringing on the Horizontal Imaginary Surface of Davis Airport, American Tower Corporation would not be in violation of The Code of Maryland Aviation Regulations (COMAR) Chapter 5, Section 11.02.05.4(A)(2). Therefore the Maryland Aviation Administration (MAA) has no objection to the construction of the proposed tower at that reduced height." [Exhibit No. 80].

Mr. Donohue also cited the Federal Aviation Administration's September 7, 2001 Determination of No Hazard to Air Navigation as evidence in the record that the proposed monopole at the requested location and a height of 134 feet, will not create an unsafe condition for airplane traffic at Davis Airport. Mr. Donohue stated that the monopole will not be in the Runway Protection Zone [Transcript, September 4, 2002, p.34].

7. Mr. Donohue argued that opposition parties had access to the Applicant's RF propagation maps at the September 19, 2001 and October 3, 2001 meetings of the Tower Committee. He stated that at the September 19, 2001 meeting, he offered to "come out to Etchison with the RF engineer with the maps and to go over this in detail" [Transcript, September 4, 2002, p. 36]. Mr. Donohue further stated that citizens had the opportunity to view the RFmaps and ask questions about them at the Planning Board's meeting to consider the application. Finally, Mr. Donohue stated that during the public hearing before the Hearing Examiner, opposition parties had access to the maps and the opportunity to question the Applicant's RF engineer.

FINDINGS OF THE BOARD

1. The Board finds that opposition parties had appropriate access to the Applicants' Radio Frequency propagation maps. Although citizens had no copy of the maps, the Board believes that having had the opportunity to view them at two meetings of the Tower Committee, as well as at the Planning Board hearing and during the public hearing before the Hearing Examiner, afforded parties reasonable access and the opportunity to view, analyze and question this evidence.

2. The Board finds that construction of a 134' monopole in the location proposed, will not create an unsafe condition for airplane traffic at Davis Airpark. The Board gives great weight to the Hearing Examiner's Report and Recommendation, and is confident, that although the Hearing Examiner may not have specifically referenced Exhibit No. 90, submitted by opponents of the application, he carefully weighed all of the evidence before him. The Board finds the MAA and FAA findings regarding the proposal persuasive and further notes that the proposed monopole will not be in the runway protection zone.

Therefore, based upon the foregoing, on a motion by Angelo M. Caputo, seconded by Louise L. Mayer, with Allison Ishihara Fultz and Donald H. Spence, Jr., Chairman, in agreement, and Donna L. Barron necessarily absent:

BE IT RESOLVED by the Board of Appeals for Montgomery County, Maryland that in Case No. S-2477, Petition of American Tower Corporation and AT&T Wireless Services, the Board adopts the Report and Recommendation of the Hearing Examiner, and **grants** the special exception, subject to the following conditions:

1. Petitioner shall be bound by its testimony and exhibits of record, the testimony of its witnesses and representations of its attorney, to the extent that such evidence and representations are identified in the Board's opinion granting the special exception.

2. The Petitioner shall submit a tree protection plan to the Environmental Planning staff for approval prior to release of sediment and erosion control or building permits, as appropriate.

3. Petitioner must comply with the Montgomery County Department of Permitting Services requirements for sediment and erosion control and stormwater management.

4. Petitioner must replace all trees cleared at a rate of 1:1 dbh (diameter at breast height). Reforestation must occur on site or with the same watershed.

5. Petitioner must submit a reforestation plan to the Environmental Planning staff.

6. The monopole must be removed at the cost of the Petitioner when the telecommunication facility is no longer in use by any telecommunication carrier.

7. Petitioner must coordinate with the Access Permits Section of the Maryland State Highway Administration on the location and specifications for the gravel driveway access from MD 108.

8. All co-locators must use a T-arm or other low profile design to minimize the visual impact of the co-locator's antennas.

Donald H. Spence, Jr.
Chairman, Montgomery County Board of

Appeals

Entered in the Opinion Book
of the Board of Appeals for
Montgomery County, Maryland
this 4th day of October, 2002.

Katherine Freeman
Executive Secretary to the Board

NOTE:

Any request for rehearing or reconsideration must be filed within fifteen (15) days after the date the Opinion is mailed and entered in the Opinion Book (See Section 59-A-4.63 of the County Code). Please see the Board's Rules of Procedure for specific instructions for requesting reconsideration.

Any decision by the County Board of Appeals may, within thirty (30) days after the decision is rendered, be appealed by any person aggrieved by the decision of the Board and a party to the proceeding before it, to the Circuit Court for Montgomery County, in accordance with the Maryland Rules of Procedure.

